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No. 88-1770

IN THE

# Supreme Court of the United States

October Term, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
*Petitioner,*

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## *AMICUS CURIAE* BRIEF OF THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

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## QUESTIONS TO BE CONSIDERED

I. The petition for a writ of *certiorari* should be granted to enable this Court to determine whether disparate impact analysis is appropriate in an ADEA action.

II. The petition for a writ of *certiorari* should be granted to enable this Court to clarify the standard of proof required to establish a willful violation of ADEA.

III. The petition for a writ of *certiorari* should be granted to determine whether an employer must show age-related cost factors in order to establish a 4(f)(2) defense under ADEA, and to clarify the grounds on which a finding of subterfuge may properly be based.

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## *AMICUS CURIAE* BRIEF OF THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

## STATEMENT OF INTEREST

The Defense Research Institute, Inc. has obtained the consent of the attorney for the petitioner and the attorney for the respondent to file this brief *amicus curiae*. Letters of consent from both parties are on file with this Court.

The Defense Research Institute, Inc. ("DRI") is a national organization comprised of approximately 15,000 defense trial lawyers, corporate and insurance counsel. DRI was established in 1961 to improve the skills and further the goals of defense counsel through participation in the legislative and judicial process. The organization has a vigorous employment law committee, whose members actively conduct seminars and contribute to publications in the employment law area, in addition to trying cases and advising their clients.

The interest of DRI in this case arises from several factors. First, this case presents an opportunity for the Court to rule on the major unsettled area of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 *et seq.* (1982) ("ADEA")—whether the "disparate impact" theory developed by this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* (1964) ("Title VII"), in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), applies in ADEA cases. The major differences between ADEA and Title VII cases, including jury trials, variable class boundaries and unique statutory defenses, significantly affect defense counsel in preparing cases and advising clients.

Second, the standards for establishing willfulness under ADEA require attention so as to clarify the role of counsel in litigation work and client counseling. Since this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (hereinafter "*Thurston*"), the lower courts have adopted surprisingly inconsistent

standards. In this case, not only did counsel for Westinghouse advise Westinghouse that its plan was legal, and with certain changes would be effectively ironclad, but counsel for the EEOC in other similar litigation advised Westinghouse that the plan would be legal if the changes were made. Despite this reliance upon both its own and opposing counsel's opinions, Westinghouse is now subjected to the risk of liability for liquidated damages based upon the lower court's finding of a willful ADEA violation. From the viewpoint of counsel engaged in litigation, such a result is unacceptable. Effective and efficient conduct of litigation often involves attempts to move parties towards a position of compromise, perhaps on the entire case or perhaps on one or two issues. Such movement, in turn, depends upon an understanding of what the other party is seeking—an understanding that may properly come only from that party's lawyer. It is destructive to the process of settlement, and thus to the judicial system in its entirety, to subject a party to enhanced liability to another party for acting in reliance upon assurances provided by that other party's lawyers.

Third, a large number of employers have attempted to provide their employees with protections from economic dislocations through such devices as severance pay plans, retirement plans, sickness and accident plans and the like. In a competitive economy, it is important to maximize the overall benefit of these plans in a coordinated fashion so that one group of employees will not receive a disproportionately high share of the limited resources available at the expense of other groups. The impact of the decision below will be to give just such a windfall to retirement-eligible employees. In the longer term, the result will be to discourage employers from creating or expanding such benefit programs.

## REASONS FOR GRANTING THE WRIT

### I. The petition for a writ of *certiorari* should be granted to enable this Court to determine whether disparate impact analysis is appropriate in an ADEA action.

This Court has never resolved the issue of whether disparate impact analysis, which was developed in cases arising under Title VII, is applicable to an action based upon ADEA. *Markham v. Geller,* 451 U.S. 945, 947-48 (1981) (Rehnquist, *J.*, dissenting from denial of *certiorari*). The lower courts have generally assumed that disparate impact analysis can be transplanted into an ADEA action without performing an adequate analysis to determine whether the legislative history and statutory framework of ADEA justify this extension of Title VII jurisprudence. The petition should be granted in this case to enable the Court to resolve this critical issue, and to deal with the ever-increasing number of decisions in which courts have cavalierly imported disparate impact analysis into ADEA cases based on faulty and incomplete analyses.

Several courts have mistakenly assumed that this Court authorized disparate impact analysis in an ADEA action by its decision in *Thurston. See, e.g., Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094 (11th Cir 1987). In *Thurston,* however, the challenged policy of TWA was expressly based upon age, and the plaintiffs introduced that policy as direct evidence of intentional age discrimination. Since the policy at issue in *Thurston* was not facially neutral, this Court was not presented with an opportunity to determine the applicability of disparate impact analysis.

Other courts have also failed to recognize that an age-based employment policy, which, by definition, treats employees differently on account of their age, presents an issue of disparate treatment rather than

disparate impact. As a result, courts have approved disparate impact analysis in cases that, when properly understood, only present a disparate treatment question, because there is no facially neutral policy at issue. *See Popko v. City of Clairton*, 570 F. Supp. 446, 451 (W.D. Pa. 1983). These decisions have subsequently been relied on without analysis by other courts as authority for the application of disparate impact analysis in an ADEA action. *See, e.g., Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-28 (7th Cir. 1986); *Reilly v. Prudential Property & Casualty Ins. Co.*, 653 F. Supp. 725 (D.N.J. 1987).

Still other courts have applied disparate impact analysis in ADEA actions without any analysis of whether such application is appropriate outside the special context of Title VII. *See, e.g., Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Cotton v. City of Alameda*, 812 F.2d 1245 (9th Cir. 1987); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) (hybrid case presenting both disparate treatment and disparate impact claims). These decisions have, in turn, been relied upon by other courts. *See, e.g., Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (hybrid case presenting both disparate treatment and disparate impact claims).

In short, while the majority of lower federal courts that have addressed this issue have concluded that disparate impact analysis is appropriate in an ADEA action, many of these decisions have been based on a failure to properly distinguish disparate treatment and disparate impact issues. The decisions that have addressed the issue of whether disparate impact analysis is appropriate in an ADEA action have generally engaged in superficial analyses of the general similarities

between the statutes, and concluded that the substantive provisions of ADEA are sufficiently similar to those of Title VII to warrant the extension of disparate impact analysis to ADEA actions. *See, e.g., Geller v. Markham,* 635 F.2d 1027 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981); *EEOC v. Borden's, Inc.,* 724 F.2d 1390, 1394 (9th Cir. 1984); *EEOC v. Governor Mifflin School District,* 623 F. Supp. 734 (E.D. Pa. 1985).

What each of these cases fails to recognize is that there are significant differences between the two statutes, reflecting the more limited intentions of Congress with respect to circumscribing the right of an employer to make employment decisions based upon the age of an employee. When Congress enacted ADEA, it recognized that there are more circumstances in which an employer should be permitted to make employment decisions based on age than there are circumstances in which an employer should be permitted to make employment decisions based on race, sex, religious affiliation or national origin. Once these differences are recognized, the case for going beyond protecting employees treated differently due to their age to prohibiting use of neutral criteria that have some effect correlated with age is significantly diminished.

First, the societal premise upon which disparate impact analysis was formulated in the Title VII context is simply not present in ADEA actions. In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), this Court developed disparate impact theory in order to prevent pervasive societal discrimination in one arena (education) from posing a barrier to opportunity in another arena (employment). In so doing, the Court took judicial notice of the "built in headwind" against which the plaintiffs struggled, due to the inferior education they had received in North Carolina schools. Since Title VII was part of a broad social remedial scheme, the Court found it appropriate to adopt a legal theory that precluded an

employer from compounding the disadvantage of pervasive societal discrimination by otherwise neutral employment policies.

The goals of ADEA, on the other hand, were much more modest. The legislative history of ADEA indicates that Congress was acting upon reports that found that older persons simply did not encounter the same discriminatory animus that was levelled against the groups protected by Title VII. *See* U.S. Dept. of Labor, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 ("Wirtz Report"), contained in *Legislative History of the Age Discrimination in Employment Act* (U.S. Government Printing Office, 1981).

This Court has similarly distinguished between classifications based upon age and classifications based upon race, sex, and national origin for purposes of equal protection analysis. In *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), this Court stated that persons over the age of 40:

> unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [Older persons are not a] 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian process.' Instead, it marks a stage that each of us will reach if we live out our normal span.

*Id.* at 313-14.

In short, the problem of perpetuating past societal discrimination that the Court was concerned with in *Griggs* is absent in age cases. Since older persons have not experienced the history of purposeful discrimination that was present in the Title VII context, there is no pressing need to remedy the effects of societal discrimination that would justify the judicial invalidation of facially neutral employment policies in age cases.

Another premise of disparate impact analysis that is lacking in ADEA cases is the proposition that disparate impact will work no significant hardship upon the employer's business. It is frequently observed in Title VII cases that race, sex, etc. bear no demonstrable relation to an employee's performance, productivity, or the cost of their employment, and thus it should not affect the employer's business if the employer is precluded from making employment decisions based upon those criteria.

Age, on the other hand, is clearly at some point going to affect an employee's productivity and performance. *Vance v. Bradley*, 440 U.S. 93, 121 (1979); Wirtz Report, *supra*, at 5-6. Age is also cost-related, since older employees are more likely to be entitled to higher wages on the basis of their seniority and experience, the cost of their insurance and benefit programs is likely to be higher than that of younger workers and, in some cases, the employer will incur additional costs due to the diminished productive capacity of an older worker resulting from reduced ability or physical impairments. *See*, Note, *The Cost of Growing Old: Business Necessity and the ADEA*, 88 Yale L.J. 565 (1979).

Awareness of these factors prompted Congress to limit the scope of ADEA liability; it should also militate caution in the application of disparate impact analysis to ADEA cases. It is widely recognized that disparate impact analysis is potentially the broadest sweeping liability doctrine in discrimination law, due to its emphasis on discriminatory effects rather than discriminatory intentions. This Court itself has repeatedly refused to apply disparate impact analysis to discrimination cases arising outside the context of Title VII. *See, e.g., Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 584, n.2 (1983); *General Bldg Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-91 (1982); *Personnel Admin'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

In addition, since age is not an immutable characteristic and the protected age group can be divided into subgroups, the class of employees who may be adversely affected by an employer's policies can fairly be said to present a "moving target." It is easier for a plaintiff to establish a *prima facie* case under ADEA by manipulating the composition of the alleged class (*i.e.*, challenging a policy on the grounds that it adversely affects employees between the ages of 40 and 50, 40 and 70, 55 and 65, over 70, etc.) than under Title VII, where the class is "immutable" and cannot be regrouped. Likewise, it is more difficult for an employer to devise and test policies and programs that will not adversely affect some conceivable subset of older employees than it is for the employer to ensure that none of its programs or policies adversely affects women, blacks, or other groups protected by Title VII.

Finally, and perhaps most importantly, the express language of Section 4(f)(1) of ADEA, which immunizes employers from liability for different treatment based on reasonable factors other than age ("RFOA's"), has no counterpart in Title VII and precludes the very principle of disparate impact claims. Since disparate impact claims, as noted above, are by definition directed against factors other than the prohibited criteria, reliance upon those facially neutral criteria is specifically protected by the RFOA exemption. The legislative history of the RFOA exemption indicates that Congress considered test results (which are the classic example of facially neutral criteria causing a disparate impact under *Griggs*) to be an example of an RFOA. 113 Cong. Rec. 31253 (Section by Section Analysis, remarks of Senator Yarborough, Nov. 6, 1967).

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court construed language in the Equal Pay Act similar to the RFOA exemption ("a factor other than sex"), 29 U.S.C. §206(d), as precluding disparate impact analysis, and limiting the application of the Equal Pay

Act to "wage differentials attributable to [intentional] sex discrimination." *Id.* at 170. This Court should conclude that the language of ADEA similarly precludes the application of disparate impact analysis in ADEA cases. This would have the effect of permitting an employer to employ non-age-based criteria (such as "cost," "no double-dipping" or "experience level") so long as those criteria are not proxies for age, are not promulgated with an intent to discriminate and are not subterfuges to evade the purposes of the Act.

In sum, the application of disparate impact analysis to ADEA actions represents an unwarranted importation of judge-made law from the Title VII context to ADEA. In light of the different language, legislative and social history, and policy considerations of these two statutes, such an application should be rejected by this Court. Taking that action is a matter of substantial importance given the increasing number of ADEA cases alleging some disparate impact of any number of facially neutral employment policies.

## II. The petition for a writ of *certiorari* should be granted to enable this Court to clarify the standard of proof required to establish a willful violation of ADEA.

In *Thurston*, this Court approved a definition of "willfulness" under ADEA that required a plaintiff to show that the defendant either knew that, or showed reckless disregard for the matter of whether its conduct was prohibited by ADEA. *Id.* at 128-29. This Court concluded that TWA was not liable for a willful violation, although it had maintained an illegal transfer policy, because (1) there was no evidence tending to show that TWA had ever been advised by counsel that its policy discriminated on the basis of age, *id.* at 129; (2) the transfer policy was established pursuant to TWA's efforts to bring its retirement policies in line with

ADEA; and (3) it was reasonable to conclude that TWA had simply overlooked the way the policy worked when applied to its pilots. *Id.* at 130.

Since *Thurston*, the lower courts have continued to grapple with the quantum of proof required to establish a willful ADEA violation. Further clarification of this issue is of importance to defense counsel for several reasons. First, like the Fair Labor Standards Act, 29 U.S.C. §216, ADEA provides for an award of liquidated damages in an amount double the plaintiff's actual loss upon proof of a willful violation. Second, as this Court recently held in *McLaughlin v. Richland Shoe Co.*, _____ U.S. _____, 108 S. Ct. 1677 (1988), the statute of limitations is extended in cases involving a willful violation from two years to three years. Third, because of the confused state of the case law, defense counsel cannot provide advice to clients as to whether or not such conduct as consulting with a private attorney and obtaining assurances from counsel for the opposing party will protect those clients from a finding that their conduct is willful under ADEA. *Certiorari* should be granted in this case both to resolve the exceedingly confused state of the law, and to correct the plain error of the court below on this issue, since Westinghouse's conduct could not possibly be found to have been willful under the standard established by *Thurston*.

Since *Thurston*, the lower courts have issued wildly inconsistent rulings as to what is necessary to establish a willful violation of ADEA. The Second Circuit recently held that liquidated damages may be awarded when the employer is indifferent to the requirements of ADEA, and acts in a purposeful, deliberate or calculated fashion. *Benjamin v. United Merchants & Mfgrs. Inc.*, _____ F.2d _____, 49 F.E.P. Cases 1020 (2d Cir. 4/19/89). The court stated that liquidated damages would not be awarded when the employer only acts negligently, inadvertently or innocently, or even where the employer is aware of the applicability of ADEA but acts

reasonably and in good faith. The court suggested that these cases should be understood by reference to a continuum, and that resolution of those cases falling in the middle of the spectrum would turn on the fact finding and credibility determinations of the district court. *Id.* at 1023.

The Third Circuit adopted a very different test in *Dreyer v. Arco Chemical Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906, 107 S. Ct. 1348 (1987). In that case, the court turned to the Restatement (Second) of Torts, sec. 908 (1979), and adopted "outrageousness" as an appropriate prerequisite for a finding of willfulness under ADEA. The court justified this test on two grounds—first, that it was the intention of Congress for liquidated damages to be punitive in nature; second, that Congress also intended to create a two-tiered liability scheme under ADEA. Since intentional wrongdoing is necessary for a finding of any violation at all, such a finding of intentional discrimination should logically be insufficient, standing alone, to warrant imposing punitive damages. *Id.* at 657-58.

The Tenth Circuit has rejected *Dreyer*, and adopted a "predominant factor" test, which requires a plaintiff seeking liquidated damages to prove that age was the predominant factor in the employer's decision. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988). The court stated that this approach preserved the two-tiered liability scheme, while avoiding the focus on an employer's "evil motive," which it felt was implicit in the *Dreyer* standard.

The Fourth and Eighth Circuits, while declining to adopt a precise test for willfulness, have stated that an employer's awareness of the statutory provisions when it takes an adverse employment action that is later found to have been based on an employee's age is not enough to establish a willful violation of ADEA. *Gilliam v. Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987); *Bethea v.*

*Levi Strauss & Co.*, 827 F.2d 355 (8th Cir. 1987). The *Gilliam* court went on to state that a jury finding of an ADEA violation should not preclude consideration of the employer's business justification defense for purposes of determining willfulness under the statute. 820 F.2d at 1390.

The Eleventh Circuit has awarded liquidated damages where the jury found that the employer had intentionally failed to promote the plaintiff because of his age, and further found that the employer's articulated reason for its failure to promote was pretextual. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099 (11th Cir. 1987). The defendant had admitted at trial that he knew that ADEA prohibited consideration of an employee's age in making employment decisions. While he denied that he did take age into account, the denial was not credited. Based on these facts, the Court of Appeals held that the plaintiff had satisfied the strictest prong of the *Thurston* willfulness standard by proving that the employer *knew* that his conduct violated ADEA. *Id.* at 1099, 1101. However, the Court of Appeals did leave open the possibility that another employer might have been able to avoid liability for liquidated damages if it could be shown that the employer had acted in good faith. *Id.* at 1100.

The Fifth Circuit took a similar approach in *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279 (5th Cir. 1986). In that case, the court held that the district court had improperly instructed the jury that a finding of willfulness would be proper if the defendant knew or reasonably should have known that its conduct was reasonably likely to violate ADEA. The court found that the "should have known" instruction was improper under *Thurston*. However, the court went on to conclude that the error was harmless, since the jury had specifically found that the employer had terminated the

plaintiff in retaliation for filing his ADEA claim, and that the employer's stated reason for the discharge was pretextual. The employer had testified that he knew retaliatory discharge was a violation of law and, again, his denial that he had done so was not believed. *Id.* at 286. Based on these findings, the Fifth Circuit concluded that the employer's conduct was at least "reckless," and therefore satisfied the standard of proof required by *Thurston*. Thus, in these circuits, every time a jury finds a violation of ADEA by a defendant who believes that age discrimination is illegal, willfulness exists—*i.e.*, in every case.

The Sixth Circuit has held that an employer is not liable for liquidated damages if it acted in good faith and had "reasonable grounds for believing" that its conduct would not violate the Act. *Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985). In that case, the employer acted in reliance upon three district court decisions holding that the application of ADEA to state and local governments was barred by the Tenth Amendment to the United States Constitution. At the time of the employer's challenged actions, two circuits and numerous district courts had held that ADEA could constitutionally be applied to state and local governments. This Court resolved the issue in favor of the majority position in *EEOC v. Wyoming*, 460 U.S. 226 (1983), holding that ADEA was in fact constitutional as applied to state and local governments.

Given the split in the courts on this issue at the time of the employer's action, the Sixth Circuit concluded that the employer's reliance on the three district court cases was reasonable as a matter of law. 756 F.2d at 464. "To hold otherwise," stated the court, "would mean that a party always acts unreasonably in relying upon case law which, while arguably valid, adopts a distinctly minority position. It is beyond cavil that appellate courts, including the Supreme Court, sometimes adopt what

previously were minority positions." *Id.* The court also noted that the district court's factual finding that the employer had acted in good faith was not clearly erroneous. *Id.*

The Seventh Circuit holds that, in order to prove willfulness, a plaintiff must show that the defendant knew that its actions violated ADEA. *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988).

As the foregoing review of the case law demonstrates, this Court's decision in *Thurston* has provided insufficient guidance to the lower courts as to the proper standard and quantum of proof required to establish a willful violation of ADEA. The petition should be granted to resolve the resulting conflicts.

This Court should also grant the petition for *certiorari* in order to clarify the effect of communications with counsel on the existence of willfulness. In *Thurston*, this Court relied in part on the fact that TWA had consulted its attorneys, and had never been "advised by counsel that its new transfer policy discriminated against captains on the basis of age." *Id.* at 129. Since *Thurston*, the lower courts have split on the effect of communications with counsel. The decision of the district court in this case refused to give weight to the communications of EEOC counsel in prior litigation, which had indicated that the revisions made by Westinghouse in 1982 would eliminate any problems under ADEA. This ruling conflicts with a decision of the Tenth Circuit. That court has held that an employer is entitled (at least as concerns willfulness) to rely on statements made by persons charged with responsibility for enforcing compliance with federal legislation. *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1431 (10th Cir. 1985).

It is the position of *amici* that the holding of the Tenth Circuit on this issue represents the better-reasoned view. So long as an employer acts in good faith,

he should be entitled to rely upon the advice of counsel, whether private or public. Indeed, the fact that an employer has consulted with counsel and has been assured that his policies and programs are (or will be, subject to specific revisions) in full compliance with law should be dispositive on this issue, and such conduct should be recognized by this Court as a sufficient defense to allegations of willful misconduct.

In summary, the decisions of the lower courts since *Thurston* indicate a substantial degree of confusion on the part of the lower courts with respect to the type and quantum of proof required to establish a willful violation of ADEA. *Certiorari* should be granted to resolve this important issue, so that employers and courts alike will be able to determine what conduct may properly be found sufficient to warrant the imposition of liquidated damages under ADEA.

**III. The petition for a writ of *certiorari* should be granted to determine whether an employer must show age-related cost factors in order to establish a 4(f)(2) defense under ADEA, and to clarify the grounds on which a finding of subterfuge may properly be based.**

Section 4(f)(2) of ADEA exempts from ADEA's general prohibition of discrimination certain employee benefit plans, "such as a retirement, pension or insurance plan," that may differentiate based on age. The term "such as" makes the listing descriptive rather than all-inclusive. *Amicus* fully supports that portion of petitioner's brief, which contends that Westinghouse's policy is part of a single, coordinated benefit plan for purposes of ADEA. The question then becomes whether an employer must prove age-related costs in order to invoke the 4(f)(2) exemption, and whether the plan is a subterfuge to evade the purposes of ADEA.

As noted by the petitioner, the courts of appeals have been unable to resolve the issue of whether an employer must prove age-related cost justifications in order to establish a bona fide employee benefit plan that is exempt from the provisions of ADEA. This Court recently heard oral argument in *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued Mar. 28, 1989), which presents the issue of whether an age-based benefit plan that denies disability benefits to older employees (who then must take length-of-service retirement) without cost-based business justifications violates ADEA, even if it existed before ADEA applied. 57 U.S.L.W. 3598 (Mar. 14, 1989).

*Betts*, however, does not present the issue of whether age-related cost justification is necessary to make out a 4(f)(2) defense where the challenged benefit program involves pension and severance benefits rather than disability benefits. For this reason, the petition should be granted in order to resolve the current split of authority in the lower courts on the issue of whether age-related costs must be shown in cases involving pension and severance benefits.

In any event, it is the position of *amicus* that the age-related cost justification theory is unreasonable as a matter of law, since it is irreconcilable with Section 4(f)(2)'s language, its legislative history, and its congressional purpose.

An age-related cost justification requirement cannot be derived from, and indeed is inconsistent with, the language of the statute. Section 4(f)(2) unequivocally states that it "shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [ADEA]. . . ." 29 U.S.C. 623(f)(2). The term "any" means "one or another without restriction or exception . . .: All." *Websters II Riverside University Dictionary* 115

(1984). The phrase "employee benefit plan" is commonly understood—and was commonly understood in 1967—to encompass many fringe benefit systems that are without an age-related cost justification, including certain types of severance pay, sick leave, and unemployment compensation schemes. *See, e.g.,* 29 U.S.C. §1002 (ERISA's definition of "employee benefit plan").[1] Indeed, the phrase "employee benefit plan" is commonly understood to encompass various retirement, pension, and insurance plans that are without age-related cost justifications. *See, e.g., Alford v. City of Lubbock,* 664 F.2d 1263, 1267-71 (5th Cir. 1982), *cert. denied,* 456 U.S. 975 (1982) (defined contribution pension plan); *Brennan v. Taft Broadcasting Co.,* 500 F.2d 212, 215-217 (5th Cir. 1974) (profit-sharing retirement plan). The term "subterfuge" conventionally refers only to the subjective intent behind the adoption of a plan or a provision thereof; it does not refer to objective considerations such as those the age-related cost justification theory demands. *Accord, EEOC v. County of Orange,* 837 F.2d 420, 422-23 (9th Cir. 1988); *EEOC v. State of Maine,* 644 F. Supp. 223, 226 (D. Me. 1986), *aff'd mem.* 823 F.2d 542 (1st Cir. 1987); *Germann v. Levy,* 553 F. Supp. 700, 703 n.9 (N.D. Ill. 1982). In short, the language of Section 4(f)(2) does not allow the exemption properly to be limited only to plans and plan provisions with age-related cost justifications. *See, Lorillard v. Pons,* 434 U.S. 575, 581 (1978) (courts interpreting ADEA should assume Congress intended words to have their ordinary meaning).

The legislative history of Section 4(f)(2) confirms that Congress meant precisely what the language of the exemption says—that the terms of any bona fide

[1] *See also* 40 U.S.C. §276 (definition of "bona fide fringe benefits" in Davis-Bacon Act); 41 U.S.C. §351 (definition of "fringe benefits" in Service Contract Labor Standards Act of 1965); 29 U.S.C. §207(e) (listing "fringe benefits" excluded from regular wage rate calculation under Fair Labor Standards Act). *See, generally,* M. Wermel & G. Beideman, *Employee Benefit Programs* 1-4, 17-19, 23-31 (1957); American Management Association, *Employee Benefits* 23-25 (1958); M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* 20-23, 103-110 (1964).

employee benefit plan are enforceable. The original bills proposed in the House and Senate in 1967 did not contain the broad language now set forth in Section 4(f)(2). Instead, those first bills exempted only involuntary retirement terms. *See,* S. 830, 90th Cong., 1st Sess. (1967); H.R. 4221, 90th Cong. 1st Sess. (1967). Subsequently, Congress became concerned that, as written, the proposed legislation would disrupt many existing benefit plans—retirement, insurance, and otherwise.

Senator Javits, the minority floor manager of the Senate bill, proposed, and Congress eventually enacted with some modification, the language now in Section 4(f)(2) of the statute. Senator Javits assured his colleagues that this language would serve as a "fairly broad exemption . . . for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." Senate Hearings, at 28. Senator Javits wanted all barriers to the hiring of older workers removed, and in his opinion, the exemption of all employee benefit plan terms, except those limiting the right of older workers to be hired, from ADEA's prohibitions was necessary to achieve this purpose. *See id.; see also id.,* at 40 (testimony of Secretary Wirtz confirming this understanding).

Congress' reason for exempting *all* terms of covered plans is clear from the legislative record. "Congress was only too aware of the danger involved in drastically altering, in one barely considered proviso, the [employee benefit] plans already operative in 1967." *Alford v. City of Lubbock,* 664 F.2d at 1270. Thus, Senator Javits stated that "the age discrimination law [was not] . . . the place to fight the pension battle . . ." (Senate Hearings, at 27), and reiterated that he had recently introduced another bill comprehensively to deal with the benefit plan problem. (*Ibid.*). This other bill, which was a precursor of ERISA, expressly defined the term

"employee benefit plan" to include "any plan providing for the payment of . . . benefits [such as] unemployment benefits or . . . severances or similar benefits . . . ." S. 1103, 90th Cong., 1st Sess. §2(3), (4) (1967). In short, it is quite clear that the enacting Congress understood the term "employee benefit plan" to have a broad scope—which included separation pay plans—and that it used this term in order to prevent ADEA from unnecessarily disrupting the many different plans used by employers. *See* Senate Hearings at 28; 113 Cong. Rec. 31255 (1967) (remarks of Senator Yarborough); 113 Cong. Rec. 34740 (1967) (remarks of Representative Perkins).

By limiting the 4(f)(2) exemption to cost-justifiable plans, the courts would reestablish barriers to the hiring of older workers, and disrupt existing benefit plans—all against Congress' stated purpose.

The petition should also be granted in order to clarify the standard of proof required to establish that an otherwise valid employee benefit plan is not protected by Section 4(f)(2), because it is a "subterfuge to evade the purposes" of the Act. 29 U.S.C. §623(f)(2). The purposes of ADEA, as established by Congress, are:

> . . . to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. §621(b).

This Court has stated that "subterfuge" in Section 4(f)(2) must be given its "ordinary meaning." *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion.

434 U.S. at 203. The burden is on the employer to establish that the policy or program at issue is not a subterfuge to evade the purposes of the Act. *Cipriano v. Board of Educ.*, 785 F.2d 51, 58 (2d Cir. 1986).

Some courts have found that in the absence of evidence that the employer acted "in bad faith or with an age-discriminatory motive," the "mere fact that plaintiffs would have fared better under a different scheme" is insufficient to show that the system is a subterfuge under Section 4(f)(2). *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 644 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986); *See also Potenze v. New York Shipping Ass'n, Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). On remand, the district court in *Cook v. Pan American World Airways* found that a showing of a legitimate business reason was sufficient to show that the employer's seniority system was not a subterfuge. *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816, 825 (S.D.N.Y. 1986), *aff'd per curiam*, 817 F.2d 1030 (2d Cir.), *cert. denied*, _____ U.S. _____, 108 S. Ct. 259 (1987). *See also Cipriano v. Bd. of Educ., supra*, 785 F.2d at 58. The Fourth Circuit has similarly held that an employer may disprove subterfuge by showing that the challenged policy "was motivated by a legitimate business or economic purpose which, objectively assessed, reasonably justified it." *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 215 (4th Cir. 1982). The decision below is simply inconsistent with these decisions. That conflict should be resolved by this Court.

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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